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Comparing Constitutional Constraints on Government Searches: The United States and Hong Kong

Joseph N. Cotilletta

Comments

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Joseph N. Cotilletta*

I. INTRODUCTION: WHY A COMPARATIVE ANALYSIS?

Since its inception in the late eighteenth century, the United States has been a leader among democratic societies across the world.[1] Despite many ups and downs economically and politically, the United States has always maintained a reasoned and balanced legal system.[2] The strength

* J.D. Candidate 2011, The Dickinson School of Law of the Pennsylvania State University. I would like to thank my friends and family for all of their support. In particular, I would like to thank Comments Editors Matt Charles, Matt Kita, and Sylvia Marakas for their comments and edits to this comment as well as the Editor-in-Chief, Benjamin Hackman. Most importantly, I would like to thank my mother for giving me the strength to overcome all of life's obstacles and for instilling a vision in me to help make the world a better place.

1. *See* Dale W. Jorgenson & Kevin J. Stiroh, *Raising the Speed Limit: U.S. Economic Growth in the Information Age*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 126, 128 (2000).

2. *See* Richard A. Primus, *When Should Original Meanings Matter?* 107 MICH. L. REV. 165, 200 (2008); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1, 38-39 (2008).

and vitality of this legal system are based on many features.[3] One feature is that United States citizens are afforded rights against unwarranted government intrusions.[4] In particular, the rights protecting citizens from government searches lie within the Fourth Amendment of the federal Constitution.[5]

Since the ratification of the Fourth Amendment, the United States has recognized a need to limit government intrusion regarding and police misconduct in investigative searches.[6] The Fourth Amendment establishes credibility in our government by requiring that certain standards be met before an investigative search begins. It also grants citizens protection under the federal Constitution, the supreme law of the land.[7] The Fourth Amendment is vast and exemplifies true legal ingenuity that all nations should observe.

In the Far East, China's role on the world stage has been receiving increasing attention.[8] As communist China continues to grow, so must its economic, political and legal systems.[9] While China has effectively integrated democratic principles economically, it has struggled to form sound political and legal systems.[10]

Politically, the recent acquisition of Hong Kong from the United Kingdom placed China in a position where it had to incorporate democratic principles in a communist state.[11] China's solution was a policy called "One Country, Two Systems."[12] Legally, the "One Country, Two Systems" policy lead China to create the Basic Law,[13] which represents a separate constitution for Hong Kong.[14]

Despite the success and growth that communist China has recently experienced, it has failed to protect Hong Kong citizens as extensively as the United States protects its citizens.[15] Although the Basic Law appears to have democratic principles, in application the words are

3. *See* Richard A. Primus, *When Should Original Meanings Matter?* 107 MICH. L. REV. 165, 200 (2008).

4. *See* U.S. CONST. amend. IV; U.S. CONST. amend. V.

5. *See* U.S. CONST. amend. IV.

6. *See* Katz v. United States, 389 U.S. 347, 356 (1967).

7. *See* Marbury v. Madison, 1 Cranch 137, 180 (1803).

8. *See* Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 4-11 (2006).

9. *See id.*

10. *See infra* Parts III, IV.

11. *See* Denis Chang, *The Imperatives of One Country, Two Systems: One Country before Two Systems?* 37 HONG KONG L.J. 351, 352 (2007).

12. *See id.*

13. The Basic Law is the U.S. Consitution equivalent in Hong Kong. *See* Denis Chang, *The Imperatives of One Country, Two Systems: One Country before Two Systems?* 37 HONG KONG L.J. 351, 352 (2007).

14. *See id.*

15. *See infra* Parts III, IV.

meaningless.[16] The Basic Law articles that pertain to government searches are interpreted to allow judges to exercise discretion and ultimately to ignore intrusive government actions, even if a citizen's Basic Law rights have been breached.[17]

This Comment identifies deficiencies in the Basic Law's protections against government searches by comparing the Basic Law with the Fourth Amendment of the United States Constitution. Such a comparative analysis is consistent with one purpose of comparative legal analyses generally, namely, "be[ing] useful in the national law-making process."[18] After introducing "why a comparative analysis?" in Part I, this Comment continues in Part II by examining the history behind the Fourth Amendment.[19] Part II will also examine the Hong Kong equivalent of the Fourth Amendment by looking at the intent and text of certain Basic Law articles.[20]

Part III discusses judicial analysis of the constitutional law applicable to government searches in both the United States and Hong Kong.[21] In particular, Fourth Amendment protection in the United States requires that there be a search,[22] and that the search be unreasonable.[23] However, there are exceptions that allow searches to be conducted even though they would ordinarily be considered unreasonable.[24] In Hong Kong, case law is scarce, and courts resort to foreign case law from the United Kingdom, Canada and New Zealand.[25] As a result, the merger between the common law and the Basic Law yield a confusing test that applies to situations involving government searches.[26]

Part IV of this Comment examines the differences in the substantive law regarding government searches in the United States and Hong Kong.[27] Both systems have differences regarding when an individual has a reasonable expectation of privacy.[28] Both systems also have differences regarding the admissibility of evidence.[29] Furthermore, where these two systems derive their legal principles may be the main

16. *See infra* Part III.B.
17. *See infra* Part III.B.
18. MARY A. GLEDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 9-12 (West Publ'g Co. 1982).
19. *See infra* Part II.A.
20. *See infra* Part II.B.1-2.
21. *See infra* Part III.
22. *See infra* Part III.A.1.
23. *See infra* Part III.A.2.
24. *See infra* Part III.A.3.
25. *See infra* notes 343, 349-53 and accompanying text.
26. *See infra* Part III.B.
27. *See infra* Part IV.
28. *See infra* Part IV.A.
29. *See infra* Part IV.B.

cause of such divergent analyses in two countries that appear similar on the surface.[30] Another difference is how each nation views its constitution.[31] The United States views its Constitution as the supreme law of the land, whereas Hong Kong views the Basic Law as on par with any other legal code.[32] Finally, Part IV examines a landmark Hong Kong case through the lens of Fourth Amendment legal rules and analysis.[33]

Part V concludes this Comment with a summary of how the intent, text, and application of constitutional constraints on government searches differ between the United States and Hong Kong.[34] Part V also concludes that historical and political factors[35] may be responsible for the significant differences between the two systems.[36]

II. AN HISTORICAL PERSPECTIVE

In the United States, the Fourth Amendment has existed for more than 200 years.[37] Because the Fourth Amendment has existed for such a long time, scholars believe originalism[38] is one of the better approaches to Fourth Amendment analysis.[39] Recently, the United States Supreme Court stressed the importance of an originalist approach by stating that "in determining whether a challenged police intrusion violates the Fourth Amendment, [we] will 'inquire first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed.'"[40]

In contrast, Hong Kong's Fourth Amendment equivalent has a comparatively short legal history due to the implementation of the Basic Law in 1997.[41] The Basic Law is the supreme law of the land in Hong Kong.[42] As a result, political tensions have arisen between mainland China's Constitution and Hong Kong's Basic Law despite the "One

30. *See infra* Part IV.C.
31. *See infra* Part IV.D.
32. *See infra* notes 403-4 and accompanying text.
33. *See infra* Part IV.E.
34. *See infra* Part V.
35. *See infra* Part V.
36. *See infra* Part V.
37. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 99 MICH. L. REV. 547, 557 (1999).
38. Originalism is described as "Prescriptive language is to be understood by reference to evidence of the actual, contemporaneous mental states of the inscribers of the language at issue." *See* Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343, 343 (1995).
39. *See* Primus, *supra* note 3, at 165.
40. *See* Wyoming v. Houghton, 526 U.S. 295, 299 (1999).
41. *See* Chang, *supra* note 11, at 352.
42. *See id.*

Country, Two Systems" policy.[43] Due to the relatively short history of Hong Kong's Fourth Amendment equivalent, emphasis should be placed on the political tensions between China and Hong Kong when analyzing the Basic Law, instead of on an originalist approach. Examining these political tensions will help to show the intent of the Basic Law.

A. The United States and the Fourth Amendment

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[44]

Irritated by the invasiveness of searches that British rulers were authorizing,[45] the framers of the United States Constitution set out to write an amendment to protect against "general warrants that allowed expansive, unlimited police searches of persons and property."[46] In writing this amendment, the framers looked at similar provisions in the individual states.[47]

The individual states were the first to adopt the "unreasonable search and seizures" language.[48] Massachusetts was the first to add "unreasonable" before "search and seizures" in a 1780 law banning general warrants[49] issued by the legislature.[50] "Unreasonable" in the late eighteenth century "connoted illogic and inconsistency in a violation of a rule or principle."[51]

In the constitutional context, "unreasonable" evolved from the form of "against reason," which had been used in noteworthy cases in Britain

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43. *See id.*

44. U.S. CONST. amend. IV.

45. *See* Davies, *supra* note 37, at 577.

46. Sammer Bajaj, note, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors*, 109 COLUM. L. REV. 309, 334 (2009).

47. *See* Davies, *supra* note 37, at 688.

48. *See id.*

49. A general warrant that gives a law enforcement officer broad authority to search and seize unspecified places or persons. *See* BLACK'S LAW DICTIONARY 1616 (8th ed. 2004).

50. *See* Davies, *supra* note 37, at 684.

51. Davies, *supra* note 37, at 687 (citing A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (unpaginated)).

to "denounce violations of fundamental legal principle."[52] John Adams, the founding father who personally drafted the Massachusetts search-and-seizure provision, took the wording from James Otis's[53] 1761 argument during the Writs of Assistance Case.[54] In that case, Otis argued against that the use of a general warrant to invade a private residence stood "against reason."[55]

Otis was not the sole critic of general warrants. Other common-law authorities condemned such warrants as "unreasonable." For example, in colonial Boston, a 1742 treatise on the law of arrest criticized the "[u]nreasonableness, and seeming [u]nwarrantableness of [general warrants]."[56] Moreover, when Judge William Blackstone[57] discussed the inherent rights of English subjects in his 1765 commentaries,[58] he invoked Lord Coke's[59] assertion that general warrants causing imprisonment were "against reason" and converted "against reason" to "[u]nreasonable."[60] Thus, the use of the term "unreasonable" to

52. *See* Davies, *supra* note 37, at 687 (citing Dr. Donham's Case, 8 Coke Rep. at 118a, 77 Eng. Rep. at 652 (1610), which elaborates on Coke's use of "against reason" as a label of unconstitutionality).

53. James Otis, Jr. was a lawyer in colonial Massachusetts who was an early advocate of the political views that led to the American Revolution. *See* ADAM G. MERCER ET AL., JAMES OTIS, THE PRE-REVOLUTIONIST (Diane Nafis & Don Nafis eds., 2001).

54. *See* Davies, *supra* note 37, at 690 (citing John Adams, Argument and Report, *in* 2 LEGAL PAPERS OF JOHN ADAMS 123-44 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)) (stating that John Adams adopted the wording from Otis's 1761 argument during the Writs of Assistance Case, where Otis argued against the use of a general warrant to invade one's ship or building and argued such use as "against reason").

55. *See* Davies, *supra* note 37, at 690 n.400 (1999) (citing John Adams, Argument and Report, *in* 2 LEGAL PAPERS OF JOHN ADAMS 123-44 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

56. *See* Davies, *supra* note 37, at 690 (quoting the Law of Arrests § 8, at 173-74 (London 1742). Adams apparently referred to this passage in his legal notes for a 1765 case. *See* John Adams, Argument and Report, *in* 1 LEGAL PAPERS OF JOHN ADAMS 102 n.74 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

57. Sir William Blackstone (1723-1780) was a Judge of the Court of Common Pleas and was considered a prominent legal scholar. His commentaries on the law of England were often cited by the courts and were treated as authority. *See* David Nash Ford's Royal Berkshire History, Sir William Blackstone (1723-1780), http://www.berkshire history.com/bios/wblackstone.html (last visited Aug. 29, 2010).

58. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (1769), *reprinted in* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION 1765-1769, at 133 (Stanley N. Katz ed., The University of Chicago Press 1979).

59. Sir Edward Coke was a seventh-century judge and Member of Parliament whose writings on the common law remained applicable 150 years after his death. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 167 (Oxford University Press 4th ed. 2002).

60. *See* Davies, *supra* note 37, at 692 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (1769), *reprinted in* WILLIAM

condemn general warrants had been fairly established when Adams wrote the 1780 Massachusetts provision.[61]

The term "unreasonable" carried to the federal level of government when James Madison, the founding father who drafted many of the proposals for the federal rights amendments,[62] drafted the proposal for the Fourth Amendment.[63] Some scholars believe that Madison adopted "unreasonable" from the Massachusetts provision.[64]

Elsewhere in his proposal, Madison adopted the "probable cause" standard, which had not been adopted in any previous state search-and-seizure provision,[65] but which was in fact taken from a 1786 Pennsylvania statute.[66] As to what property the amendment would cover, Madison proposed extending seizure protection to "possessions."[67] However, "possessions" was eventually changed to the seemingly less inclusive "effects" by the "Committee of Eleven"[68] of the House of Representatives.[69] At that time, "effects" was understood to mean moveable goods or property (but not real property),[70] which may show that the Committee of Eleven intended a narrower term than "possessions."[71] But ultimately, the Fourth Amendment was adopted to

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BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION 1765-1769, at 133 (Stanley N. Katz ed., The University of Chicago Press 1979)).

61. *See* Davies, *supra* note 37, at 692.

62. *See id.* at 696.

63. *See id.*

64. *See id.* at 695-96 (stating that Madison adopted parts of the Virginia Constitution, which he also drafted, but that parts of the Virginia search-and-seizure provision was taken from the Pennsylvania provision).

65. *See id.* at 703 (1999).

66. *See* Davies, *supra* note 37, at 703 n.444 (1999) (citing 30 PA. CONS. STAT. ANN. § 3 (1786), which stated that the Pennsylvania statute required a showing of "probable cause" for granting a search warrant for a house to a national customs collector).

67. *See id.* at 708-11 (describing Madison's use of "property" as a broad encompassing power to ensure citizens' protections against intrusion).

68. The Committee of Eleven was a special group consisting of one delegate from each state. *See* BRITANNICA CONCISE ENCYCLOPEDIA: CONSTITUTION OF THE UNITED STATES (2008).

69. *See* Davies, *supra* note 37, at 710-11 (citing House Committee of Eleven Report (July 28, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223-24 (6.1.1.2)(Neil H. Cogan ed., 1997) (noting that this was the only deliberate and significant change made to Madison's proposal that resulted in today's "effects" as seen in the U.S. Constitution)).

70. *See* Davies, *supra* note 37, at 711 (citing Oliver v. United States, 466 U.S. 170, 177 n.7 (1984)).

71. There is scholarly debate over the terms "possession" and "effects" and whether either is actually broader or narrower than the other. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1167 (1991).

protect citizens against "political violence,"[72] such as unreasonable and unwarranted government intrusion.

In conclusion, the ratifiers of the Fourth Amendment adopted much of its language from the individual states.[73] The states are believed to have adopted their language from legal scholars in Britain who opposed certain legal devices employed by Britain's government.[74] Thus, the Fourth Amendment's origins are bound up with rebellious legal scholars of the eighteenth century.[75]

B. Hong Kong's Equivalent to the Fourth Amendment of the United States

1. The Intent of the Basic Law of Hong Kong

Before 1978, China was a strict communist nation. It was separate from Hong Kong,[76] which was a British colony.[77] In 1978, China underwent political, economic and legal reforms.[78] It adopted a market-oriented economy through Deng Xiaoping's[79] "Four Modernizations."[80] Political and legal reforms accompanied the adoption of the Constitution of the People's Republic of China in 1982.[81]

In 1984, the Sino-British Joint Declaration[82] ("Joint Declaration") granted the government of the People's Republic of China ("PRC") control over Hong Kong effective July 1, 1997.[83] Hong Kong became the Hong Kong Special Administrative Region ("HKSAR") of the

72. Bruce P. Smith, *The Fourth Amendment, 1789-1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663, 664 (2008).

73. *See supra* notes 40-66 and accompanying text.

74. *See supra* notes 52-63 and accompanying text.

75. *See supra* note 53.

76. *See* Sun Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 CHINESE J. INT'L L. 339, ¶ 10 (2008).

77. *See id.*

78. *See* Sang Woo Lee, Note, *An Obligation to Act: When the U.S. Voices Concern About China's Criminal Justice System*, 20 TEMP. INT'L & COMP. L.J. 591, 591 (2006).

79. Deng Xiaoping was a prominent Chinese politician, statesmen, theorist and diplomat. As a leader of the Communist Party of China, he became a reformer who led China towards market economics. *See* Michael Yahuda, *Deng Xiaoping: The Statesman*, THE CHINA QUARTERLY, Sep. 1993, at 551-572.

80. *See* Lee, *supra* note 78, at 591 (quoting JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 704 (Norton 1990)).

81. *See id.* at 591.

82. The Joint Declaration was an agreement between the PRC and Britain where both governments would exchange the exercise of sovereignty over Hong Kong on July 1, 1997 (from Britain to PRC). The PRC Government also declared its basic policies regarding Hong Kong in the Joint Declaration. *See* http://www.hkbu.edu.hk/~pchksar/JD/jd-full1.htm, ¶ 1 (introduction).

83. *See* Zhichao, *supra* note 76, at ¶ 1.

PRC,[84] under the principle of "One Country, Two Systems."[85] "One Country" meant that power would remain with the central authorities of the PRC,[86] while "Two Systems" meant that the PRC would grant Hong Kong a high degree of "autonomy."[87] "Autonomy" meant that Hong Kong would continue to use the common-law system in effect during the days of British colonial rule.[88] In addition, the British and Chinese governments agreed to establish a Joint Liaison Group that was responsible for consulting on the implementation, through legal formulations, of the Joint Declaration between the PRC and Hong Kong.[89]

Before China regained control in 1997 through the Joint Declaration, Hong Kong had been under British colonial rule for more than 150 years.[90] The Basic Law faithfully incorporates most of the requirements of the Joint Declaration and tries to expressly secure the rule of law in Hong Kong through continued implementation of the common law.[91] However, the PRC has not given complete autonomy to Hong Kong. As a result, major issues linger concerning interpretation of the Basic Law in a system that has a mixture of communist and democratic values.[92] For instance, liberal human-rights guarantees are adequately provided for but are put at risk by national-security and public-order provisions elsewhere in the Basic Law.[93] Moreover, the PRC can overturn the decisions of Hong Kong's courts[94] by the use of the Standing Committee.[95]

The Standing Committee's power to interpret the Basic Law endangers the "One Country, Two Systems" policy by making the policy

84. XIANGGANG JI BEN FA Art. 1.

85. *See* XIANGGANG JI BEN FA Art. 5. *See also* Sun Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 CHINESE J. INT'L L. 339, 339 (2008) (stating that "One Country, Two Systems" principle means the socialist system and policies will not be practiced in Hong Kong).

86. *See* Chang, *supra* note 11, at 352.

87. *See* XIANGGANG JI BEN FA Art. 12.

88. *See infra* notes 345-358 and accompanying text.

89. *See* Zhichao, *supra* note 76, at ¶ 12.

90. *See id.* ¶ 10.

91. *See* Michael C. Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT'L L. REV. 165, 177 (2006).

92. *See id.*

93. *See id.*

94. *See id.* at 177-78.

95. The Standing Committee is a committee of about 150 members of the National People's Congress (NPC) of the PRC. The committee has constitutional authority to modify legislation within limits set by the NPC and thus acts as a *de facto* legislative body. The Standing Committee also has the power to interpret the laws of PRC, including the Basic Law of Hong Kong. *See* XIAN FA arts. 57-61, 65-69 (2004) (P.R.C).

little more than a hypocritical statement.[96] In particular, one scholar noted that the PRC can file a motion with the Standing Committee to reinterpret the Basic Law and effectively overturn any provision, thereby affecting the outcome of a case on appeal.[97] The PRC's ability to overturn cases at any time may jeopardize the system established by the Joint Declaration.[98] The Joint Declaration is meant to retain the democratic system that existed under British colonial rule before Britain agreed to cede Hong Kong to China.[99] However, easily overturned cases will be a drastic departure from more democratic systems like the legal systems of Britain and the United States. In a system such as the United States, the Constitution (which is the Basic Law equivalent) cannot be overturned by any committee but has specific provisions dealing with amending the Constitution itself.[100]

Although there have been no reports of the Standing Committee overturning cases involving Article 28[101] or Article 30[102] of the Basic Law, there would be ideological ramifications to the Joint Declaration as a result of a case being overturned.[103] For example, it is plausible that if the Standing Committee were comprised of politically corrupt individuals or of individuals fearful of the PRC, the Standing Committee could overturn a law at the PRC's behest. This would result in an unstable legal system.[104] Unlike Hong Kong, the United States ensures that the rights of its citizens are protected from political violence by honoring the Constitution as the supreme law of the land,[105] amendable only as stated in the Constitution itself.[106]

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96. *See* Davis, *supra* note 91, at 177.

97. *See id.* at 183-84.

98. *See* XIAN FA arts. 57-61, 65-69 (2004) (P.R.C.).

99. *See* Chang, *supra* note 11, at 352.

100. *See* U.S. CONST. art. V.

101. Article 28 of the Basic Law is one of two relevant Basic Law provisions for the analysis. *See infra* notes 107-10 and accompanying text.

102. *See* XIANGGANG JI BEN FA Art. 30.

103. The implications are obvious. For example, an individual may be convicted of a crime based on unlawfully seized evidence from an unlawful search. If a high court decides to overturn the lower court and grant the individual freedom because of corrupt government actions, the standing committee has the right to overturn that judgment, forcing the individual to remain in jail while the government perpetrates corrupt acts. This is mere speculation, but the result is plausible. *See* Michael C. Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT'L L. REV. 165, 183-84 (2006).

104. Legal scholars have discussed the possibility of the standing committee overturning cases. *See* Michael C. Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT'L L. REV. 165, 183-84 (2006). However, I am merely speculating on a potential scenario.

105. *See* Marbury v. Madison, 1 Cranch 137, 180 (1803).

106. Corrupt government actions, such as unlawful law-enforcement procedures to search individuals and homes, are rendered fruitless and thus deterred because of the

2. The Text of the Basic Law of Hong Kong

Two articles in the Basic Law of Hong Kong resemble the Fourth Amendment of the United states Constitution.[107] The first is Article 28, entitled "The freedom of the person of Hong Kong Residents shall be inviolable."[108] Article 28 states:

> No Hong Kong resident shall be subject to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.[109]

The second sentence is the most relevant here because it pertains to searches.[110]

Textual differences exist between the Fourth Amendment and Article 28 of the Basic Law.[111] The first difference is the expansive definition that the Fourth Amendment gives the word "search."[112] As a result, the plain meaning of the Fourth Amendment provides more protection than Article 28. The Basic Law only focuses on the unlawful search of the body,[113] whereas the Fourth Amendment adds "houses, papers, and effects."[114]

A second textual difference pertains to the word "arbitrary" in Article 28 and the word "unreasonable" in the Fourth Amendment.[115] According to Black's Law Dictionary, "arbitrary" is defined as "depending on individual discretion . . . determined by a judge rather than by fixed rules, procedures, or law."[116] "Unreasonable" is defined as "not guided by reason; irrational or capricious."[117] According to its plain

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proactive nature of the Fourth Amendment. It is not worth the time for law enforcement to create new procedures if it is possible that they will not comport with the Fourth Amendment.

107. *See* U.S. Const. amend. IV; XIANGGANG JI BEN FA arts. 28 & 30.

108. XIANGGANG JI BEN FA art. 28.

109. *Id.* (emphasis added).

110. The Fourth Amendment deals with searches and seizures. For the purposes of this Comment, there will be only an analysis of the search aspect of the Fourth Amendment. Since this is a comparative analysis, it only matters what part of Hong Kong's Basic Law pertains to a search analysis. The other two sentences deal with detention and torture, both of which may have more to do with Fifth Amendment rights such as *Miranda* rights.

111. *See* U.S. Const. amend. IV; XIANGGANG JI BEN FA art. 28.

112. *See supra* notes 70-90 and accompanying text.

113. *See* XIANGGANG JI BEN FA art. 28.

114. U.S. CONST. amend. IV.

115. *See* U.S. CONST. amend. IV. *See also* XIANGGANG JI BEN FA arts. 28 & 30.

116. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).

117. *Id.* at 1574.

meaning, "arbitrary" would seem to allow for searches based on potentially flawed procedures, provided the searches were not initiated at an individual's discretion. In the United States, the source of the government's right to search the individual does not matter. If the source is irrational, then it will be superseded by the Fourth Amendment. In other words, the Fourth Amendment provides a defendant an opportunity to overturn a government procedure if the procedure is interpreted to be irrational. Hong Kong's use of the word "arbitrary" does not necessarily provide the same opportunity.[118]

China chose different words that, at their very foundation, appear to have different definitions and potentially different outcomes.[119] Unlike the United States, Hong Kong was not trying to rebel from Britain and therefore had no reason to follow the common law as influenced by Otis and Blackstone.[120] The lack of a rebellious attitude could be one explanation for such differences despite the fact that Hong Kong and the United States were originally influenced by British colonial rule.[121] This also supports the aforementioned notion that the rebellious legal scholars of Britain had a profound influence on the Fourth Amendment.[122]

Most interestingly, both the United States and Hong Kong, historically, were British colonies, but both currently have dissimilar laws.[123] This divergence can be analogized to divergent evolutionary lineages.[124] The United States and Hong Kong represent two different species derived from the same common ancestor (Britain). Over time the United States and Hong Kong split into two distinct species. The causes of this divergence may include rebellious legal scholarship on the one hand, and "One Country, Two Systems" on the other.

The Court of Final Appeal[125] in Hong Kong has briefly discussed Article 28 thus:

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118. *See supra* notes 40-80 and accompanying text.

119. As evidenced by the plain-meaning analysis conducted in this Comment.

120. Hong Kong was a part of Great Britain until the implementation of the Joint Declaration. *See* Sun Zhichao, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 CHINESE J. INT'L L. 339 (2008). The U.S. broke away from Britain with the Declaration of Independence. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

121. *See* Yash Ghai, *The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?* 37 HONG KONG L.J. 363, 367 (2007).

122. *See supra* note 53 and accompanying text.

123. *See supra* notes 40-100 and accompanying text.

124. The analogous theory to scientific evolution represents my thinking on the issue.

125. This Court is the equivalent to a Circuit Court of Appeals in the United States. *See* THE BLUEBOOK: A UNIFORM SYSTEM of CITATION 275 tbl.T.2 (Columbia Law Review Ass'n et al. eds., 16th ed. 9th prtg. 1999).

> [Article 28] is found in chap. III of the Basic Law which sets out the fundamental rights and freedoms which are constitutionally guaranteed and which lie at the heart of Hong Kong's separate system. . . . [T]hese provisions should be generously interpreted to ensure that Hong Kong residents enjoy the full measure of those rights and freedoms. . . . Article 28 prohibits not merely 'unlawful' . . . but 'arbitrary or unlawful.' . . . [S]uch arbitrariness may reside in the substantive rules of criminal liability. . . . [A]rt.28 was capable of invalidating, on the grounds of arbitrariness, substantive criminal laws. . . . '[A]rbitrary' turned on the nature and extent of any departure from the substantive and procedural standards involved . . . *arbitrary if it was capricious, unreasoned, or without reasonable cause, that was, if it was made without reference to an adequate determining principle or without following proper procedures. 'Arbitrariness' was not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. . . .*[126]

The above quote from *Lau Cheong & Another v. HKSAR*[127] explains the scope of Hong Kong's search provision.[128] According to the Court of Final Appeal, the mere inappropriateness of a rule regarding a search of items, for example, may be grounds for striking down the rule even though a police officer followed the rule properly.[129]

Another relevant doctrine for searches is Article 30[130] of the Basic Law. Article 30 states:

> The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communications of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.[131]

Article 30 importantly clarifies Hong Kong's accepted definition of "search." In line with the holding in the U.S. case of *Katz v. United*

126. Lau Cheong & Another v. HKSAR, [2002] 2 H.K.L.R.D. 612, 614-627 (C.F.A.) (emphasis added).

127. The defendant in this case argued to the Court of Final Appeal that his conviction was unconstitutional because the grievous-harm rule under the Hong Kong murder statute was "arbitrary." Although the facts are different the Court goes into an extensive discussion of the term "arbitrary" within the provisions of Article 28 of the Basic Law. *See* Lau Cheong & Another v. HKSAR, [2002] 2 H.K.L.R.D. 612, 614-627 (C.F.A.).

128. *See id.*

129. *See id.* at 627.

130. *See* XIANGGANG JI BEN FA art. 30.

131. *Id.*

States,[132] a search in Hong Kong occurs if the government listens to audio communications or surveys actions visually portrayed via video surveillance.[133] In contrast, the Fourth Amendment is considered a part of the penumbra of rights that create the right of privacy in the United States.[134]

To understand Article 30, we must take stock of how courts interpret it. Article 30 has been read by the Court of Appeal of the High Court in *HSKAR v. Chan Kau Tai*[135] to apply only to audio communications.[136] The *Chan Kau Tai* Court also carved out an exception to Article 30[137] by holding that a government agency may interfere with the right of privacy of communications if there is a legal procedure in place authorizing the use of surveillance for criminal investigations.[138] In *Chan Kau Tai*, however, the Court held that the defendant's right of privacy had been infringed because no such legal procedure was in place.[139]

There are several foundational differences between the search provisions of the Hong Kong and United States constitutions.[140] The United States has one amendment that covers search-related issues.[141] Hong Kong, conversely, has at least two applicable constitutional provisions.[142] Furthermore, the words used under each system are different[143] and, as a result, lead to different results when applied to the same set of facts.[144]

III. CONDUCTING A CONSTITUTIONAL CRIMINAL PROCEDURE ANALYSIS

A. The United States

A plain-meaning analysis of the Fourth Amendment leaves many questions unanswered. The amendment's plain meaning allows searches

132. *See* Katz v. United States, 389 U.S. 347, 347 (1967).
133. *See* XIANGGANG JI BEN FA art. 30. *See also* Katz v. United States, 389 U.S. 347, 347 (1967).
134. *See* Roe v. Wade, 410 U.S. 113, 113 (1973).
135. *See* HSKAR v. Chan Kau Tai, [2006] 1 H.K.L.R.D. 400, 400 (C.A.).
136. *See id.* at 437 (C.A.).
137. *See id.*
138. *See id.*
139. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 441.
140. *See supra* notes 40-130 and accompanying text.
141. *See* U.S. CONST. amend. IV.
142. *See* XIANGGANG JI BEN FA arts. 28 & 30.
143. *See supra* notes 40-114 and accompanying text.
144. *See infra* notes 416-24 and accompanying text.

as long as they are reasonable.[145] Over the years, the United States Supreme Court has created tests that determine whether a search has taken place[146] and whether a search is unreasonable.[147] The Court has also crafted exceptions by which some searches, which would ordinarily be deemed unreasonable, may be deemed reasonable.[148]

1. Defining a Search

The legal definition of "search" was established in the 1960s in *Katz v. United States*.[149] In *Katz*, the petitioner was found guilty of transmitting betting information by telephone from Los Angeles to Miami and Boston in violation of a federal statute.[150] At trial, the prosecution was permitted to introduce evidence of the petitioner's telephone conversations that had been overheard by FBI agents who had attached an electronic listening-and-recording device outside of the public telephone booth from which the petitioner made the calls.[151] The Court of Appeals for the Eleventh Circuit rejected the petitioner's argument that the recordings had been obtained in violation of the Fourth Amendment because there had been no physical intrusion into the area the petitioner occupied.[152] The United States Supreme Court considered the issues, formulated by the petitioner, of whether: (1) the public telephone booth was constitutionally protected under the Fourth Amendment; and (2) the physical penetration of a constitutionally protected area was necessary for a violation of the Constitution to occur.[153] The Supreme Court explicitly rejected the formulation of the issues presented in the petitioner's brief[154] and stated that

> *[T]he Fourth Amendment protects people, not places.* What a person knowingly exposes in public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[155]

145. *See infra* notes 160-250 and accompanying text.
146. *See infra* notes 149-82 and accompanying text.
147. *See infra* 182-250 ad accompanying text.
148. *See, e.g.*, Bond v. United States, 529 U.S. 334, 338 (2000); Smith v. Maryland, 442 U.S. 735, 735 (1979); Katz v. United States, 389 U.S. 347, 347 (1967); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).
149. Katz v. United States, 389 U.S. 347, 347 (1967).
150. *See id.* at 348.
151. *See id.*
152. *See id.* at 348-49.
153. *See id.* at 349-51.
154. *See Katz*, 389 U.S. at 350.
155. *Id.* at 351 (1967) (emphasis added, citations omitted).

The Court's holding was clarified by Justice Harlan's concurring opinion where he stated the two-part requirement "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[156] The Court found that the Government had performed a search under the Fourth Amendment because the petitioner had sought to exclude the "uninvited ear,"[157] and the act of closing the telephone-booth door allowed the petitioner to reasonably assume, as society would agree, that his conversation would be in private.[158]

The two-part test for reasonable expectation of privacy[159] established in *Katz*,[160] was refined in subsequent Supreme Court cases. In *Smith v. Maryland*,[161] the Court clarified the test by identifying relevant factors to be applied in the analysis.[162] In *Smith*, a woman who was robbed and who had received threatening telephone calls by the petitioner gave police the petitioner's license-plate number when she caught the petitioner stalking her.[163] Using the license-plate number, police located the petitioner's home.[164] The police then requested that the telephone company install a pen register, which would record the numbers the petitioner dialed from his home phone.[165] The pen register confirmed that the petitioner was the individual who was making the threatening phone calls,[166] and the pen-register tape was admitted into evidence against the petitioner.[167] The issue before the Court was whether the installation and use of the pen register constituted a search within the Fourth Amendment.[168] The Court held that the installation and use of the pen register was not a search within the Fourth Amendment for several reasons.[169]

First, the Court rejected the petitioner's argument that he had an actual, or subjective, expectation of privacy when he dialed numbers on

156. *Id.* at 361.
157. *See id.* at 352.
158. *See id.*
159. The Concurrence in *Katz v. United States* lead to the adoption of the two-prong test for "reasonable expectation of privacy." The first prong is called the actual or subjective prong. The second prong is called the reasonable or objective prong. The former looks to the defendant's thoughts and actions, while the latter looks to see if those actions and thoughts are the kind that society deems "reasonable."
160. *See Katz*, 389 U.S. at 350.
161. Smith v. Maryland, 442 U.S. 735, 735 (1979).
162. *See id.*
163. *See id.* at 737.
164. *See id.*
165. *See id.*
166. *See Smith*, 442 U.S. at 737.
167. *See id.* at 738.
168. *See id.* at 736.
169. *See id.* at 745-46.

his phone.[170] The Court considered whether other individuals in the petitioner's situation would understand that they had to convey information (in this case, telephone numbers) to a third party.[171] Applying this standard to the facts, the Court determined that individuals in the petitioner's situation would recognize that the telephone numbers they dialed were shown on their billing statements. Thus they could not subjectively believe they had a privacy right.[172] Other factors that were considered in the subjective-expectation prong included whether one realizes that the third party with whom he or she interacts has the ability to make permanent records of the information being disputed[173] and whether the device is generally used by the public.[174] A factor that the Court found as irrelevant to the subjective prong was the location of the activity, specifically when the content searched was in a public place.[175]

The Supreme Court stated that, even if the petitioner had a subjective expectation of privacy, that expectation was not one that society was "prepared to recognize as 'reasonable.'"[176] In making this determination, the Court considered whether the individual turned over information to a third party.[177] At the same time, a factor the United States Supreme Court held irrelevant was whether the information was conveyed through automation.[178]

Subsequent cases have shown what factors courts should consider in determining whether there has been a search.[179] Under the subjective-expectation analysis, courts determine whether the object that was allegedly searched was one "which the person tried to keep close at

170. *See Smith*, 442 U.S. at 742.

171. *See id.* (stating that there is no privacy when the public knows of it).

172. *See id.*

173. *See id.* (stating that the petitioner should have known that telephone companies kept records of telephone numbers dialed for billing purposes).

174. *See id.* at 743 (stating that pen registers are in common use in the U.S. for recording data for billing purposes).

175. *See Smith*, 442 U.S. at 744 (once the item is in the general public, it is no longer private, and, therefore, the reasonable expectation of privacy is lost along with the Fourth Amendment protection).

176. *Id.* at 743 (citing Katz v. United States, 389 U.S. 347, 361 (1967)).

178. *See id.* at 744 (giving information can reasonably lead to a loss of privacy).

179. *See Smith*, 442 U.S. at 745 (1979) (stating that recording by operator or by pen register is irrelevant for Fourth Amendment analysis).

179. *See* Kyllo v. United States, 533 U.S. 27, 29 (2001); Bond v. United States, 529 U.S. 334, 338 (2000).

hand."[180] Also, courts should consider whether the effect was placed in an opaque container.[181]

Under the objective-expectation prong, courts examine whether the inspection was tactile as opposed to visual.[182] The analysis takes into account the totality of the circumstances,[183] and future Supreme Court cases will continue to add factors to the analysis.[184]

2. Defining Unreasonable Searches

If a government action does not constitute a search, then the Fourth Amendment affords the individual no protection.[185] However, when there is a search, it must be reasonable.[186] The Fourth Amendment protects citizens only from "unreasonable searches."[187] The plain meaning of the Fourth Amendment indicates that for a search to be reasonable it must be accompanied by a warrant that is based on probable cause, that is supported by oath or affirmation, and that particularly describes the place to be searched.[188]

a. The Probable Cause Requirement for Searches

The probable-cause requirement pertains to both searches and seizures.[189] Probable cause has two separate and distinct standards for searches and seizures.[190] Generally, probable cause to search requires "a certain quantum of likelihood that: [1] something that is properly subject to seizure by the government, *i.e.*, contraband or fruits, instrumentalities, or evidence of a crime, [2] is presently [3] in the specific place to be searched."[191] The following cases reveal the complexity of the probable-cause standard.

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180. *See* Bond v. United States, 529 U.S. 334, 338 (2000) (holding that a bag in overhead storage is an object that the petitioner can expect to remain private, but an object stored under the bus cannot be expected to remain private).

181. *See id.* (holding that a clear bag exposes the object to the public, consequently losing its Fourth Amendment protection).

182. *See id.* at 337-38 (stating that the act of feeling for an object that is not visible to the public may be in violation of the Fourth Amendment).

183. *See* Illinois v. Gates, 462 U.S. 213, 215 (1983).

184. *See* Bond v. United States, 529 U.S. 334, 337-38 (2000).

185. *See supra* notes 161-67 and accompanying text.

186. *See infra* notes 203-241 and accompanying text.

187. U.S. CONST. amend. IV.

188. U.S. CONST. amend. IV.

189. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 49 (Lexis Nexis 6th ed. 2008) (1994).

190. For the purposes of this analysis, the relevant standard will be the probable-cause standard for searches. *See id.*

191. *See id.* at 49-50.

In *Brinegar v. United States*, the United States Supreme Court clarified the test used to determine whether there is probable cause to conduct a search.[192] In *Brinegar*, an investigator for the Alcohol Tax Unit was parked in a car along the Oklahoma-Missouri border when the defendant drove by in his Ford coupe.[193] The investigator had arrested the defendant five months earlier for illegal importation of alcohol, had witnessed the defendant load liquor into the trunk of his car on two occasions over the preceding six months, and knew the defendant had a reputation for carrying liquor.[194] The investigator testified that the defendant sped up as he drove past and that the rear of the defendant's car looked "heavily loaded."[195] The investigator began to chase the defendant for a mile at top speed until the defendant swerved off the road.[196] Once stopped, the defendant admitted to the investigator that there was alcohol in the vehicle.[197] He was subsequently arrested, and the alcohol was seized.[198]

The defendant was convicted of importing liquor into Oklahoma from Missouri in violation of a federal statute.[199] The question presented to the Court was whether there was probable cause to search the defendant's car.[200] The Court held that there was probable cause for the search (and subsequent arrest) based on a totality-of-the-circumstances approach.[201] Under this approach, the Court held that the probable-cause standard required a fair probability that the evidence in existence at the time of the search would suggest an illegal act had occurred.[202] The *Brinegar* Court found that such a probability existed, given that the investigator had witnessed the defendant load liquor into the car on previous occasions, had arrested the defendant for a similar violation previously, and observed the defendant traveling to the state border.[203] The totality-of-the-circumstances approach stated in *Brinegar* was vague and did not specify what a court should consider when determining whether a fair probability existed for law enforcement to search an individual.

192. *See* Brinegar v. United States, 338 U.S. 160, 175-76 (1949).
193. *See id.* at 161-62.
194. *See id.* at 163.
195. *See id.*
196. *See id.*
197. *See Brinegar*, 338 U.S. at 163.
198. *See id.*
199. *See id.* at 161.
200. *See id.* at 164.
201. *See id.* at 176.
202. *See Brinegar*, 338 U.S. at 175-76.
203. *See id.* at 169-70.

Another case that clarifies the probable-cause standard but that also adds irrelevant factors to the probable-cause analysis is *Whren v. United States*.[204] *Whren* involved a traffic-law violation that led to a traffic stop and drug bust.[205] The question presented to the Supreme Court was whether the traffic violation sufficed as probable cause to search for drugs.[206] The Court held the stop was reasonable under the Fourth Amendment.[207] The Court rejected the petitioner's argument that the subjective intentions of the officer should be considered during probable-cause analysis under the Fourth Amendment.[208] Moreover, the Court held that racial profiling is irrelevant in probable-cause analysis and that such an issue should be dealt with under the Equal Protection Clause, not the Fourth Amendment.[209] *Whren* helps to clarify the probable-cause standard by showing what evidence courts should not consider.[210]

b. The Warrant Requirement

The plain meaning of the Fourth Amendment's warrant requirement is that a valid warrant for a search must be based on probable cause,[211] must describe the particular place of the search, describe the particular thing to be seized,[212] and must be supported by oath or affirmation.[213] Case law has added another requirement, namely, that the warrant be issued by a neutral and detached magistrate.[214] However, this requirement is not explicitly mentioned in the Fourth Amendment.[215]

In *Groh v. Ramirez,*[216] the Supreme Court set forth the requirements for a valid search warrant.[217] Groh, an agent for the Bureau of Alcohol, Tobacco, and Firearms, prepared an application for a warrant to search a ranch for automatic firearms, automatic weapons parts, destructive

204. *See* Whren v. United States, 517 U.S. 806, 806 (1996).
205. *See id.* at 808.
206. *See id.*
207. *See id.* at 819.
208. *See id.* at 813.
209. *See Whren*, 517 U.S. at 813.
210. *See id.*
211. *See supra* notes 140-80 and accompanying text.
212. The particularity requirements for both searches and seizures are relatively similar. The difference is simply whether description is for a place or an item to be seized. Nonetheless, the major similarity is that the scope of authority that a police officer has with regards to the search must be within the bounds of the warrant. *See* Atwater v. Lago Vista, 532 U.S. 318, 321 (2001).
213. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 122-125 (Lexis Nexis 6th ed. 2008) (1994).
214. *See id.*
215. *See id.*
216. *See* Groh v. Ramirez, 540 U.S. 551, 551 (2004).
217. *See id.* at 555.

devices, and receipts pertaining to the purchase of these items.[218] Groh then submitted the application, a detailed affidavit, and a completed warrant form to a magistrate. The magistrate signed the warrant form.[219] Although the warrant application described the contraband that was sought, the warrant itself did not.[220] The warrant only described the defendant's house as the place to be searched; it made no mention of the stockpile of weapons.[221] The warrant did state that the magistrate was satisfied that the affidavit established probable cause.[222] A search of the premises turned up no illegal weapons or explosives.[223]

The *Groh* Court held that the warrant was invalid and that the search was unreasonable.[224] The Court found that the warrant had "complied with the first three . . . requirements: it was based on probable cause, supported by a sworn affidavit, and it described particularly the place of the search. On the fourth requirement [of particularly describing the things to be seized], however, the warrant failed altogether. . . ."[225] Furthermore, the Court found that "the warrant did not simply omit a few items or misdescribe a few of several items. . . . It stated that the items consisted of a 'single dwelling residence . . . blue in color.' In other words, the warrant did not describe the items to be seized *at all*."[226] The Court rejected the Government's argument that the particularity requirement was satisfied by a warrant application describing the items to be seized.[227]

Several important conclusions are to be drawn from *Groh*. First, the Court reaffirmed the need for probable cause, the need for an affidavit to show probable cause, and the need for both the place to be searched and the items to be seized to be particularly described in the warrant.[228] Second, an oath or affirmation *is the* affidavit requirement.[229] Third, warrants themselves (both for search and seizure) must describe the Government's scope of authority; this can be done by specifying what item will be seized.[230] For example, a warrant may state the Government plans to search a law-school building on a specific date in order to seize a machine gun. Essentially, the scope of the warrant would limit the

218. *See id.* at 554.
219. *See id.*
220. *See id.*
221. *See Groh*, 540 U.S. at 554.
222. *See id.* at 555.
223. *See id.*
224. *See id.* at 563.
225. *See id.* at 557.
226. *See Groh*, 540 U.S. at 558.
227. *See id.* at 557.
228. *See id.*
229. *See id.*
230. *See id.*

search to places within the building that could contain a machine gun. For example, the Government could not search a small backpack lying in a hallway because a machine gun does not fit in a small backpack. The implication is that the larger the object, the narrower the Government's search must be.[231] Even if all four of the warrant requirements be satisfied, the Government still needs a neutral and detached magistrate to issue the warrant.[232]

Although issues regarding the neutrality of magistrates are rare,[233] the Supreme Court addressed one directly in *Connolly v. Georgia*.[234] In *Connolly*, the Court held that the actions of a magistrate judge who, in light of a Georgia statute,[235] received five dollars for issuing a warrant but no compensation for refusing to issue one, were constitutionally impermissible.[236] Furthermore, the Court held that the magistrate must also be "detached" from, or not affiliated with, law enforcement.[237]

3. Exceptions that Make a Search Reasonable

Exceptions to the Fourth Amendment search provision can be divided into two categories: exceptions to the warrant requirement, and exceptions to the probable-cause requirement.

a. Exceptions to the Warrant Requirement: Exigent Circumstances and Plain View Doctrine

Normally, a government search requires the execution of a warrant that is based on probable cause,[238] that describes the particular place of the search, that describes the particular thing to be seized,[239] and that is

231. *See Groh*, 540 U.S. at 557.

232. *See id.*

233. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 125 (Lexis Nexis 6th ed. 2008) (1994).

234. *See* Connolly v. Georgia, 429 U.S. 245, 245 (1977).

235. *See id.* at 246 (quoting GA. CODE ANN. s 24-1601 (1971) (stating that under the Georgia Statute, the fee for the issuance of a search warrant by a Georgia justice of the peace "shall be" $5, "and it shall be lawful for said (justice) of the peace to charge and collect the same." If the requested warrant is refused, the justice of the peace collects no fee for reviewing and denying the application)). This created an incentive for justices to issue warrants. *Id.*

236. *See id.* at 251.

237. *See id.* at 248-50.

238. *See supra* notes 112-186 and accompanying text.

239. The particularity requirements for both searches and seizures are relatively similar. The difference is simply whether the description is for a place or an item to be seized. Nonetheless, the major similarity is that the scope of authority that a police officer has with regards to the search must be within the bounds of the warrant. *See* Atwater v. Lago Vista, 532 U.S. 318, 321 (2001).

supported by oath or affirmation.[240] However, when exigent circumstances arise, the government need not get a warrant before executing a search.[241]

The case on point is *Warden v. Hayden*.[242] In *Warden*, an armed robber stole money from a cab company and ran to a house on a particular street.[243] Police pursued and, after getting consent by Mrs. Hayden to enter the house, found the armed robber feigning sleep.[244] While the officers arrested the defendant, another officer searched the cellar "for a man or the money" and found clothes in a washing machine similar to the clothes worn during the robbery.[245] Furthermore, another officer heard running water in a bathroom next to the room in which the defendant had been arrested and found a shotgun and pistol in the flush tank.[246] All of these items were introduced as evidence against the defendant at trial.[247]

The Supreme Court affirmed the Court of Appeals for the Fourth Circuit, which had ruled that the search of the defendant and entry into the home without a warrant were valid.[248] The Court noted that "the exigencies of the situation made that course imperative."[249] The Court noted that the police were informed that an armed robbery had taken place, and that the police entered a house that the defendant entered only five minutes earlier.[250] The Court stated that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[251] However, the Court clarified that the "[s]cope of the search must . . . be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."[252] In other words, the search can go as far as the police may need it to go in order to stop the suspect and prevent further danger. In *Warden*, the police officer who searched the washing machine knew that the robber was armed and did

240. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 122-125 (Lexis Nexis 6th ed. 2008) (1994).

241. *See generally* Vale v. Louisiana, 399 U.S. 30, 30 (1970); Warden v. Hayden, 387 U.S. 294, 294 (1967).

242. *See* Warden v. Hayden, 387 U.S. 294, 294 (1967).

243. *See id.* at 298.

244. *See id.*

245. *See id.*

246. *See id.*

247. *See Warden*, 387 U.S. at 298.

248. *See id.*

249. *See id.* (quoting McDonald v. United States, 335 U.S. 451, 456 (1948).

250. *See id.*

251. *Id.* at 298-99.

252. *See Warden*, 387 U.S. at 299.

not know that some weapons had been found by the time he searched the machine.[253] According to the Court, the officer was fully justified in looking for weapons.[254]

Since *Warden*, the Court has limited this exception.[255] In *Welsh v. Wisconsin*,[256] the defendant was driving erratically and began to swerve, eventually driving off the road and onto an open field from which he subsequently fled.[257] Police soon arrived, and witnesses told police that the defendant was either sick or inebriated.[258] After checking the vehicle's registration, police learned that the defendant lived within walking distance of the abandoned car.[259] Policed entered his house without a warrant and arrested him for driving a motor vehicle while under the influence of an intoxicant.[260] The Court held that the entry into the defendant's home was unreasonable.[261]

The Court stated that it only "recognized a few . . . emergency conditions" that justify an exception to the warrant requirement.[262] The Court noted that homes have special Fourth Amendment protection and that the defendant's crime was "minor."[263] The government asserted three different exigencies that justified warrantless entry of a suspect's home and subsequent arrest of the suspect:[264] (1) officers were in "hot pursuit";[265] (2) officers needed to prevent the threat the defendant posed to public safety;[266] and (3) officers needed to preserve evidence of his blood-alcohol level.[267] The Court ruled that, given the particular facts of the case, none of the proffered exigency exceptions justified the warrantless search of the suspect's home.[268] The Court stated that "hot pursuit" was a successful exigency only when there was an immediate and continuous pursuit of the suspect at the scene of the crime.[269] The Court also stated that a suspect must pose a remaining threat to the public (in *Welsh*, the Court held that the moment the defendant left his vehicle,

253. *See id.* at 299-300.
254. *See id.* at 300.
255. *See generally* Welsh v. Wisconsin, 466 U.S. 740, 740 (1984).
256. *See id.*
257. *See id.* at 742.
258. *See id.*
259. *See id.*
260. *See Welsh*, 466 U.S. at 743.
261. *See id.* at 754-55.
262. *See id.* at 749-50.
263. *See id.*
264. *See id.* at 753-54.
265. *See Welsh*, 466 U.S. at 753.
266. *See id.* at 754.
267. *See id.*
268. *See id.* at 753-54. Notably, the Court did leave open the possibility that these three exigencies could justify a warrantless search in other factual circumstances.
269. *See id.* at 753.

the threat was removed).[270] Lastly, the Court added that the need to preserve dissipating evidence was valid, but it was not sufficient to justify a warrantless search in the particular circumstances of the case.[271]

Welsh clarified the exigency exception to the warrant requirement by establishing the following: (1) one's home has special Fourth Amendment protections;[272] (2) the gravity of the crime is an important factor in determining if any exigency exists;[273] and (3) "hot pursuit", the prevention of threats posed to the public safety and the preservation of dissipating evidence can be considered exigent circumstances depending on the facts of a case.[274]

The plain-view doctrine is another exception to the warrant requirement.[275] The plain-view doctrine applies to situations where an object is (1) in plain view, (2) of incriminating character (giving rise to probable cause); (3) in a place where an officer is lawfully allowed to be when the object is seen; and (4) in a place where an officer has a lawful right to grab or access the item.[276] The plain-view doctrine only applies to seizures.[277]

b. Exception to the Probable Cause Requirement: Terry Doctrine

The *Terry* doctrine[278] creates an exception to the probable-cause requirement such that probable cause is not needed for the government to search an individual.[279] Instead, the *Terry* doctrine sets a lower standard to permit intrusion and involves a different type of test.[280] The *Terry*

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270. *See Welsh*, 466 U.S. at 753.
271. *See id.* at 754.
272. *See id.* at 750.
273. *See id.* at 753.
274. *See id.* at 753-54.
275. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 49 (Lexis Nexis 6th ed. 2008) (1994).
276. *See* Horton v. California, 496 U.S. 128, 129 (1990).
277. *See id.* at 134 (1990) (stating that the idea of the plain-view doctrine being considered an exception to the general rule of warrantless searches overlooks important differences between search and seizures:

> If an article is in plain view, neither its observation nor its seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interests. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.).

278. *See* Terry v. Ohio, 392 U.S. 1, 1 (1968).
279. *See id.* at 30.
280. *See id.* at 20.

doctrine involves a balancing test instead of the typical totality-of-the-circumstances approach advanced in *Brinegar*.[281] Under the *Terry* doctrine, it is unnecessary to have a warrant based on probable cause.[282] The *Terry* doctrine originated from the Supreme Court ruling in *Terry v. Ohio*.[283]

In *Terry*, an undercover police officer observed two defendants engage in suspicious activity.[284] The policeman testified that he saw both suspects pacing back and forth in front of a store window and that he believed they were preparing to rob the store.[285] The officer approached both men and began to question them.[286] Shortly thereafter, one of the defendants, Terry, "mumbled something," and the officer spun him around and patted down the outside of his clothing.[287] The officer felt a pistol and ordered Terry to hand it over.[288] The officer then patted down the other suspect and found a gun on his person, as well.[289] The officer never put his hands beneath the outer layer of clothing when he patted down the defendants.[290]

The issue before the Supreme Court was whether Terry's "stop and frisk" was an unreasonable search and seizure in violation of the Fourth Amendment.[291] The Court held that stops and frisks do not violate the Fourth Amendment per se.[292] In drawing this conclusion, the Court first held that a stop and frisk is equivalent to a search and seizure and, therefore, falls within the Fourth Amendment.[293] Next, the Court held that a stop and frisk is a particular type of police conduct that must be done swiftly and, therefore, is not subject to the traditional warrant procedure.[294] Instead, the Court decided that a stop and frisk is subject to the "Fourth Amendment's general proscription against unreasonable searches and seizures."[295] In other words, the Court interpreted the actual words of the Fourth Amendment as having two distinct parts, A & B.[296] Part A ends at "shall not be violated" and requires that the search

281. *See Brinegar*, 338 U.S. at 163.
282. *See Terry*, 392 U.S. at 20.
283. *See id.*
284. *See id.* at 6.
285. *See id.*
286. *See Terry*, 392 U.S. at 6-7.
287. *See id.* at 7.
288. *See id.*
289. *See id.*
290. *See id.*
291. *See Terry*, 392 U.S. at 9.
292. *See id.* at 31.
293. *See id.* at 16-17.
294. *See id.* at 20.
295. *See id.*
296. *See Terry*, 392 U.S. at 20.

and seizure not be unreasonable.[297] Part A does not, based on the plain meaning of the Fourth Amendment, require probable cause or a warrant.[298] Instead, Part B requires that a warrant be issued based on probable cause.[299] So dividing the Fourth Amendment allowed the *Terry* doctrine to exist alongside the warrant and probable-cause requirements.[300] Next, the Court held that the proper test for a stop and frisk is a balancing test of the government interest in conducting the search and seizure on one hand and the invasion that the search or seizure entails on the other.[301] The *Terry* Court held that the government's interest could be crime prevention and detection, and that searches and seizures should be limited to whatever the justification for the search is.[302] In *Terry*, the justification was to protect the police officer from gunfire and other means of assault.[303] The Court rejected the government's additional argument for destruction of evidence, stating that it was an invalid justification for both the stop and frisk and the protection of the police officer.[304]

Terry left open such questions as what burden of proof the government must carry, what precisely counts as a government interest, and what degree of protection against intrusion is afforded to citizens.[305]

The level of proof needed under the *Terry* doctrine is reasonable suspicion instead of probable cause.[306] In *Alabama v. White*, the Court defined reasonable suspicion[307] as a lower standard than probable cause that is satisfied by a lower quantity and quality of information.[308] The Court's standard requires that an officer "be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'"[309] Further, the Court stated that "the Fourth Amendment requires 'some minimal level of objective justification' for making the stop."[310]

Through a series of cases, the Court has slowly defined what is meant by "government interest."[311] In *Terry*, the crime was conspiracy

297. *See* U.S. CONST. amend. IV.
298. *See id.*
299. *See id.*
300. *See Terry*, 392 U.S. at 20-21.
301. *See id.* at 20-21.
302. *See id.* at 22.
303. *See id.* at 29.
304. *See id.* at 29.
305. *See Terry*, 392 U.S. at 29.
306. *See* Alabama v. White, 496 U.S. 325, 325 (1990).
307. *See id.*
308. *See id.* at 330.
309. *See White*, 496 U.S. at 329-30 (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).
310. *See id.* at 330 (1990) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)).
311. *See* Illinois v. Wardlow, 528 U.S. 119, 119 (2000); *White*, 496 U.S. at 325; Florida v. J.L., 529 U.S. 266, 266 (2000).

to commit armed robbery, and the Court determined that an officer's reasonable fear of life and limb was a government interest sufficient to justify the stop and frisk.[312] In *Illinois v. Wardlow*, the defendant was carrying an opaque bag, waiting on a street corner in a neighborhood that had a reputation for individuals carrying weapons.[313] The *Wardlow* Court held that the "high crime area" was a factor in the *Terry* analysis and held that the officers were in danger when they initiated the stop and frisk.[314] In *Alabama v. White*, the defendant committed a possessory offense of carrying marijuana, and, therefore, produced no fear of violence.[315] Nevertheless, the Court in *White* held that the officers had reasonable suspicion based on a tip and that sufficient government interest existed.[316] Based on these three cases alone, the Court has created a spectrum that ranges from a violent crime in progress (*Terry v. Ohio*) to a possessory offense with no fear of violence (*Alabama v. White*).[317] Essentially, there is a government interest whenever a crime is being committed.

On the other side of the balancing test is the degree of government intrusion. Several United States Supreme Court cases have scrutinized particular instances of government intrusion.[318] However, the Court will look at certain factors, such as whether a person was forcibly removed from his or her home or other place in which he or she was entitled to be and transported to a police station,[319] whether the touching was exploratory and/or grabbing,[320] and whether the duration of the stop and frisk was reasonable.[321]

312. *See Terry*, 392 U.S. at 19.
313. *See* Illinois v. Wardlow, 528 U.S. 119, 119 (2000).
314. *See id.* at 124.
315. *See White*, 496 U.S. at 327.
316. *See id.* at 332.
317. *See Terry*, 392 U.S. at 19; *White*, 496 U.S. at 327.
318. *See* Hayes v. Florida, 470 U.S. 811, 811 (1985); Minnesota v. Dickerson, 508 U.S. 366, 378 (1993); United States v. Sharpe, 407 U.S. 675, 685 (1985).
319. *See* Hayes v. Florida, 470 U.S. 811, 816 (1985) (holding that transportation of the suspect is deemed illegal if there is no probable cause and warrant).
320. *See* Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (holding that it is illegal to continue exploration after the officer has confirmed and dispelled the threat he or she feared).
321. *See* United States v. Sharpe, 407 U.S. 675, 685 (1985) (holding that the longer the duration of the search, the more likely it will be presumed to be unreasonable).

B. Hong Kong

1. Introduction

Differences between United States and Hong Kong laws regarding searches do not end at the plain meaning of the relevant texts or interpretations of intent. Rather, the ways in which the rules themselves are applied are dramatically different. The plain-meaning differences coupled with Hong Kong's continued reliance on United Kingdom case law are at the root of the issue.

2. Looking Outside Borders: Hong Kong Case Law

In the 2006 case of *HKSAR v. Chan Kau Tai* ("*Chan Kau Tai*"),[322] the Court of Appeal of the High Court in Hong Kong handed down a decision that shows one of the most important distinctions of the Hong Kong legal system. In its sixty-page opinion, the *Chan Kau Tai* Court detailed Hong Kong case law that pertains to the right of privacy, and that also pertains to government searches and seizures.[323] In *Chan Kau Tai*,[324] the Court created a test dealing with the admissibility of evidence obtained via the breach of one's constitutional rights.[325] Particularly, the Court dealt with the violation of the right of privacy against government searches in the workplace.[326] The defendant in *Chan Kau Tai* was a public servant who was suspected of taking bribes.[327] The Independent Commission Against Corruption ("ICAC") investigated the matter further by obtaining consent from the Director of Housing, who was the defendant's superior, to place covert surveillance devices throughout the office.[328] Cameras were installed to observe the defendant's conduct and to listen to the defendant's end of telephone conversations.[329] However, no listening devices were actually placed in the defendant's telephone.[330] The ICAC eventually observed the defendant counting bank notes in the office on several occasions.[331] The evidence was used against the defendant at his trial,[332] and he was convicted on sixteen counts of

322. *See* HKSAR v. Chan Kau Tai, [2006] 1 H.K.L.R.D. 400, 400 (C.A.).
323. *See id.*
324. *See id.*
325. *See id.* at 403.
326. *See id.*
327. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 401.
328. *See id.* at 435.
329. *See id.* at 436.
330. *See id.* at 436.
331. *See id.*
332. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 436.

bribery.[333] The defendant challenged the evidence on appeal because the method used to acquire it infringed his right of privacy.[334] The Court was faced with this question: when "a constitutional right is infringed, what is the status of any evidence that has been obtained in consequence of this breach?"[335]

The Court began its analysis by citing the definition of "privacy" in the Shorter Oxford English Dictionary.[336] Dissatisfied with this definition, the Court proceeded to discuss Article 30 of the Basic Law,[337] which grants Hong Kong residents the right of privacy for communications but only protects visual communication.[338] The Court also cited the common-law rule, adopted by the United Kingdom and Canada, that a right of privacy exists where one has a reasonable expectation of privacy.[339] The Court stated that the nature of the place is a factor in determining whether a reasonable expectation of privacy exists.[340] Using United Kingdom cases, the Court held that a person is entitled to a right of privacy in his or her workplace in certain circumstances.[341] The Court rejected the government's position that there was consent by the defendant's superior and that the defendant was a public servant.[342] Instead, the Court noted that the only situation where there is no right to privacy in the workplace is where employers clearly notify the employees that monitoring of the office will occur.[343] The Court's reasoning is compatible with the type of reasoning seen in the Fourth Amendment jurisprudence in the United States because knowledge of surveillance would diminish the reasonable expectation of privacy for the defendant.[344] Again, the Court of Appeal of the High Court cited cases from the United Kingdom to support its recognition of workplace privacy and the notification exception to that category of privacy.[345]

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333. *See id.* at 401.
334. *See id.* at 402.
335. *See id.* at 436.
336. "The state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion." *See* SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002).
337. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 436.
338. For the actual words of Article 30, *see supra* note 131 and accompanying text.
339. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 437.
340. *See id.* at 438.
341. *See id.*
342. *See id.*
343. *See id.*
344. *See* U.S. CONST. amend. IV.
345. For the "nature of place" factor and the exception to workplace privacy, the Hong Kong Court cited to *Halford v. United Kingdom*, (1997) 24 E.H.H.R. 523.

The Court—using the right of privacy, the reasonable-expectation test, and United Kingdom case law creating a workplace-privacy doctrine—held that the defendant's constitutional right of privacy in the workplace was breached because he did not receive notice that his office was being monitored.[346] However, the Court then asked whether "the evidence obtained by the covert surveillance in breach of the applicant's constitutional rights [was] rendered inadmissible[.]"[347]

Before answering this question, the Court expounded on the United Kingdom's answer to the question.[348] In particular, the Court cited United Kingdom cases that preceded the Joint Declaration between the United Kingdom and Hong Kong, such as *R v. Sang & Another*[349] and *R v. Cheung Ka Fai & Another*.[350] The Court quoted *R v. Cheung* for the proposition that the "test of admissibility of evidence is relevance."[351] The Court also quoted Lord Diplock in *R v. Sang*, where he wrote that "to exclude evidence obtained 'unfairly or by trickery' involves a claim to judicial discretion. . . . [A] court has no such power."[352] Furthermore, the Court cited Lord Diplock again in *R v. Sang* for the proposition that "[t]he court is not concerned with how [the evidence] was obtained."[353]

Despite acknowledging the factual differences between *R v. Sang & Another* and *R v. Cheung Ka Fai & Another*,[354] the Court adhered to the above principles created by the United Kingdom.[355] The Court also cited United Kingdom case-law that observed "the existence of discretion to exclude as well as admit" evidence.[356] But the Court did not simply adopt United Kingdom holdings and end the analysis. Instead, the Court integrated the Basic Law[357] with United Kingdom common law[358] to produce the following hybrid test:

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346. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 439.

347. *See id.*

348. *See id.*

349. *See* R v. Sang & Another, [1980] A.C. 402 (A.C.).

350. *See* R v. Cheung.Ka.Fai. & Another, [1995] 3 H.K.C. 214, 214 (C.A.).

351. *See id.* at 222.

352. *See* R v. Sang & Another, [1980] A.C. 402, 422.

353. *See id.* at 437.

354. The Hong Kong court mentions how in R v. Sang & Another, the UK court did not have to deal with any constitutional or European convention provisions or statutory provisions. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 441.

355. Although the Court in *Chan Kau Tai* stated common-law principles that originated in the United Kingdom, the Court failed to cite exactly how such principles were created. *See id.*

356. *See id.*

357. The Basic Law was not the governing law in Hong Kong when the United Kingdom cases dealing with discretion were handed down. The United Kingdom cases were litigated in 1980 and 1995. Hong Kong did not implement the Basic Law until recently. *See supra* notes 40-160 and accompanying notes.

358. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 443.

> *First*, account must of course be taken by the court of any breaches of rights contained in the Basic Law.... *Second*, any breach ... will not, however, automatically result in the exclusion of the evidence obtained in the consequence of the breach: the court still retains discretion to admit or exclude the evidence. *Third*, the discretion ... involves a balancing exercise in which the breach of constitutional rights is an important factor whose weight will depend on mainly two matters: the nature of the right involved and the extent of the breach.[359]

This test recognizes the rights provided by the Basic Law yet also contains the discretionary rule followed in the United Kingdom.[360]

Next, the Hong Kong court delved into greater detail with each of the three prongs of the test.[361] In the first prong, the Court noted that it would look at "both facets" of the "public interest" to determine whether there had been a breach of the Basic Law.[362] The facets of public interest are: [1] the interest in protecting and enforcing constitutionally guaranteed rights versus [2] the interest in the detection of crime and bringing criminals to justice.[363] The Court noted that the "latter facet of public interest receives prominence" and cited Article 30's language to bolster that proposition.[364]

The second prong, no automatic exclusion, has no specific test but is a product of United Kingdom case law.[365] As mentioned above, United Kingdom cases hold that a judge has discretion over the admissibility of evidence even after the breach of a constitutional right.[366]

The third prong, the balancing test for discretion, entails a balancing of the right that has been breached and the extent of the breach.[367] The *Chan Kau Tai* wrote that "some rights [are] more fundamental and important than others"[368] and used examples to illustrate this principle.[369]

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359. *See id.*
360. *See id.* at 441.
361. *See id.* at 443.
362. *See id.* 445.
363. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 445.
364. *See id.*
365. As mentioned earlier, the lack of an automatic exclusion is the byproduct of *R v. Sang & Another*. *See supra* notes 343-354 and accompanying text.
366. *See* R v. Sang & Another, [1980] A.C. 402 (A.C.); Halford v. United Kingdom, (1997) 24 E.H.H.R. 523.
367. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 447.
368. *Id.*
369. The Hong Kong Court gives the example of
> a breach of a defendant's constitutional right to a fair trial must inevitably result in conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary

For the extent of the breach, Hong Kong courts will look at the probative value of the evidence and at how crucial the evidence was.[370] Also, courts will look at the interests of effective prosecution (i.e., no delay or interference with the prosecution's case), punishment of crime, and detection of crime by investigating authorities.[371] The *Chan Kau Tai* Court adopted this balancing test from a New Zealand case, *R v. Shaheed*.[372]

As a result, the *Chan Kau Tai* Court held that the defendant's right of privacy was infringed by the covert surveillance but that the lower-court judge did not err in admitting the evidence based on the balancing test of the third prong.[373] The Court did not directly apply the new test to the facts presented but simply stated that the lower court did not err.[374]

Regardless of the depth of the Court's analysis, there is one important aspect to note. *Chan Kau Tai* represents the tensions, or possible alleviation of past tensions, between the old and new legal system of Hong Kong. The old system would have cited only to United Kingdom common law.[375] But the *Chan Kau Tai* Court decided to cite the Basic Law as well.[376] In a deeper sense, the Court tried to break free of its colonial roots by following the Basic Law, which was created by the PRC. Although there was no in-depth explanation of why the Court decided to merge the common law and the Basic Law,[377] *Chan Kau Tai* shows that Hong Kong may be headed in a new direction.[378] The hybrid test that the Court created reflects the "One Country, Two Systems" policy by respecting the PRC via implementation of the Basic Law, while simultaneously respecting its own autonomy by following United Kingdom case law as it did before the Joint Declaration.[379]

Overall, the *Chan Kau Tai* Court's analysis of "reasonable expectation of privacy" coupled with how it determined admissibility of evidence are important and relevant to the comparative analysis of the

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greatly in gravity. In such a case not every breach will result in a confession being excluded.

HKSAR v. Chan Kau Tai, [2006] 1 H.K.L.R.D. 400, 447 (C.A.).

370. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 449 (quoting R v. Shaheed, [2001] 2 N.Z.L.R. 377, 380 (C.A.)).

371. *See id.* at 450.

372. *See* R v. Shaheed, [2001] 2 N.Z.L.R. 377, 377 (C.A.).

373. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 451.

374. *See id.* at 449.

375. *See* Sang Woo Lee, Note, *An Obligation to Act: When the U.S. Voices Concern About China's Criminal Justice System*, 20 TEMP. INT'L & COMP. L.J. 591, 591 (2006).

376. *See* Michael Yahuda, *Deng Xiaoping: The Statesman*, THE CHINA QUARTERLY, Sep. 1993, at 551-572.

377. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 440.

378. *See id.* at 445.

379. *See id.* at 449.

Fourth Amendment of the United States Constitution. The Fourth Amendment search provision involves an analysis of one's reasonable expectation of privacy,[380] and the amendment as a whole and as enshrining a constitutional criminal-procedure right, determines whether evidence is admissible.[381]

IV. THE FORCES THAT DRIVE THE DIFFERENCES IN SUBSTANTIVE LAW

Based on the cases discussed above, the major differences between the United States and Hong Kong search-and-seizure case law can be placed into four categories: [1] the meaning of reasonable expectation of privacy under each system; [2] the method each system uses to determine the admissibility of evidence; [3] the sources to which both systems derive their standards and tests; and [4] the viewpoints each system has regarding constitutional rights.

A. Reasonable Expectation of Privacy

Hong Kong courts seem to focus on the relevance of evidence rather than the reasonable expectation of privacy.[382] *Chan Kau Tai* explicitly states that it is "not necessary" to embark on a privacy analysis; instead, the Court discusses the admissibility of evidence in general based on the test it formulated.[383] In fact, the opinion quickly concludes that the defendant's right of privacy was breached because he was unlawfully searched without consent.[384] The analysis only discusses one factor, the nature of the place where the defendant was when he was searched, and the *Chan Kau Tai* Court quickly cites United Kingdom cases without giving a more robust explanation.[385] Unlike United States courts, Hong Kong courts seem to avoid an objective/subjective-expectation-of-privacy test to determine if a defendant has been searched.[386] Instead, the *Chan Kau Tai* Court states that the workplace has a presumption of privacy absent certain circumstances, such as when employees are notified that they are being monitored.[387]

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380. *See Katz*, 389 U.S. at 347.

381. Any violation of the Fourth Amendment results in the evidence being "tainted" and inadmissible or suppressed at trial. This is known as the Fruit of the Poisonous Tree doctrine. *See* Weeks v. United States, 232 U.S. 383, 383 (1914).

382. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 444 (noting that the role of the court is not to determine whether unlawfully obtained evidence may be admissible).

383. *See id.* 439-440.

384. *See id.* at 450.

385. *See id.* at 438.

386. *See* HKSAR v. Chan Kau Tai, [2006] 1 H.K.L.R.D. 400, 438-39 (C.A.); *cf.* Katz v. United States, 389 U.S. 347, 347 (1967).

387. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 438-39.

In the United States, courts determine whether the Fourth Amendment has been infringed mainly by means of focusing on reasonable expectations of privacy and other tests and factors.[388] The different focus of each analysis may be due to the fact that in Hong Kong, evidence may be admissible despite a breach of constitutional rights.[389] If a Hong Kong judge may exercise discretion even after a constitutional breach, then what is the point of detailing whether a breach occurred? From a judicial-efficiency standpoint, much time and money might be saved were focus placed on the "back end" of the analysis (the test for discretion to admit or exclude evidence) rather than on the "front end" of the analysis to determine if a defendant's reasonable expectation of privacy had been breached. Conversely, it would make more sense for United States courts to spend a majority of their time determining whether there was a search, regardless of its reasonableness, because the moment evidence fails the objective/subjective-expectation-of-privacy-tests or does not meet the exceptions for probable cause and a warrant, it is tainted, and it is inadmissible or suppressed via the fruit-of-the-poisonous tree doctrine.[390]

B. Admissibility of Evidence

United States and Hong Kong courts treat the infringement of a constitutional right in alarmingly different ways. In the United States, evidence obtained when a constitutional right is infringed is tainted and is subject to suppression or deemed inadmissible pre-trial.[391] In Hong Kong, there is no automatic exclusion.[392] As mentioned above, Hong Kong judges resort to a discretionary test to determine if such evidence should be admitted or excluded.[393] The test is protracted and takes into account several public interests.[394]

There is a diminished value in the Basic Law of Hong Kong. Based on *Chan Kau Tai*, constitutional breaches seem to be a rather minor issue. Examples given by the *Chan Kau Tai* Court[395] show that an individual can have his or her constitutional rights violated and yet subsequently be convicted based on evidence that was acquired

388. *See supra* notes 162-183 and accompanying text.
389. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 438-39.
390. *See* Weeks v. United States, 232 U.S. 383, 383 (1914).
391. Looking at any Fourth Amendment case, the end result is either suppression or admission of evidence. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 383 (1914).
392. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 439.
393. *See id.* at 443.
394. *See id.* at 445-49.
395. *See id.*

improperly.[396] If the Basic Law cannot protect an individual in Hong Kong, what will?

C. *The Legal Foundation of Each System's Principles*

The sources that United States and Hong Kong courts cite are important to note for the purpose of predicting future case outcomes. In the United States, Fourth Amendment case analysis consists of citing contemporary sources (i.e., recent precedent) combined with taking an originalist approach.[397] In Hong Kong, however, courts will look to the case law of other countries.[398] In *Chan Kau Tai*, the Court looked to the United Kingdom, Canada and New Zealand.[399] Several reasons explain this difference in how the two systems treat case law.[400] For the United States, historically, the idea was to rebel from the ways of Great Britain and to reject how Great Britain regarded searches and seizures.[401] For Hong Kong, the Basic Law is relatively new and requires courts to continue to interpret the Basic Law with common-law principles derived from the United Kingdom. In *Chan Kau Tai*, the Court looked to cases handed down before the implementation of the Basic Law.[402] These sources for the principles of citation are at the heart of some of the major substantive differences in both countries' analyses of privacy and the admissibility of evidence.

D. *Constitutional Viewpoint*

In the United States, an individual's constitutional rights are significant, and every constitutional right is treated seriously.[403] In Hong Kong, as demonstrated in *Chan Kau Tai*, courts place less significance on constitutional rights.[404] The *Chan Kau Tai* Court notes that in determining the third prong of its admissibility test (viz., the discretion to admit or exclude evidence), the nature of the right is important.[405] In particular, the Court states that some rights are more important than others and that breaches of more important rights result in a greater

396. *See id.* at 447.
397. *See* Kyllo v. United States, 533 U.S. 27, 27 (2001).
398. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 439.
399. *See id.*
400. *See id.*
401. *See supra* notes 106-183 and accompanying text.
402. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 441.
403. *See* Marbury v. Madison, 1 Cranch 137 (1803).
404. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 441 (stating that breach of a constitutional right is not a per se ground for the inadmissiblity of evidence).
405. *See id.* at 447.

likelihood of evidence so obtained being excluded.[406] Furthermore, the *Chan Kau Tai* Court states that the breach of a constitutional right is only one factor in its test.[407] In the United States, a breach of a constitutional right, a Fourth Amendment right in particular, results in the suppression or inadmissibility of evidence.[408] Moreover, in the United States, if a constitutional right is breached or infringed, the individual is granted the fullest extent of protection the federal Constitution has to offer.[409]

E. United States Rule Applied to Chan Kau Tai

United States courts might interpret the *Chan Kau Tai* facts as not constituting an infringement of the defendant's right of privacy. The United States uses a subjective/objective-expectation-of-privacy-test to determine first whether a search has taken place.[410] The *Chan Kau Tai* defendant appears to have a subjective expectation of privacy because he may not have received notice that his workplace was being monitored,[411] and he may not have realized that his company could use monitoring to make records of his activity.[412] Furthermore, the covert surveillance device that was used is not generally used by the public.[413] On the other hand, the defendant's subjective belief that he has a right of privacy in his workplace may be objectively unreasonable. A public servant who counts bank notes in the open when that servant lacks authority to deal in bank notes enjoys a lowered expectation of privacy. Furthermore, the inspections in *Chan Kau Tai* were mainly visual,[414] and so long as the defendant was in the open when he conducted allegedly illegal activities, he should have known that even someone passing by could visually inspect his activities.[415]

Assuming the *Chan Kau Tai* defendant had a reasonable expectation of privacy, United States courts would most likely consider the search of both his person and office to be unreasonable. First, the facts in *Chan Kau Tai* are lacking on the issue of probable cause.[416] The *Chan Kau Tai* opinion only states that the government had reason to believe that the

406. *See id.*
407. *See id.* at 404.
408. *See* Weeks v. United States, 232 U.S. 383, 383 (1914).
409. *See generally* Katz v. United States, 389 U.S. 347, 347 (1967); Smith v. Maryland, 442 U.S. 735, 736 (1979).
410. *See Katz*, 389 U.S. at 347.
411. *See Smith*, 442 U.S. at 736.
412. *See id.*
413. *See id.*
414. *See Bond*, 529 U.S. at 334.
415. *See Smith*, 442 U.S. at 735.
416. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 421.

defendant was taking bribes.[417] Assuming arguendo that probable cause existed, there was no warrant or any attempt to secure a warrant to place the covert surveillance devices in the defendant's office.[418] Furthermore, the *Chan Kau Tai* facts do not suggest exigent circumstances existed as to allow the government to use covert devices.[419] There are, however, facts that support seizure under the plain-view exception. The videotape showed the *Chan Kau Tai* defendant counting bank notes.[420] But the plain-view exception fails to justify the seizure because the government did not inadvertently happen upon the defendant counting the bank notes. Instead, the government entered his office before he was observed counting the bank notes and installed the covert device.[421]

Overall, a Fourth Amendment analysis applied to the facts of *Chan Kau Tai* shows clear differences between the United States and Hong Kong systems. The United States system is complex and is derived from more than 200 years of case law.[422] Hong Kong's Fourth Amendment equivalent is simple and consists of one test and several sub-tests.[423] Hong Kong's test allows for less analytical work by judges and ultimately is reducible to judicial discretion.[424]

IV. CONCLUSION: DEMOCRATIC SKIN, COMMUNIST HEART

Despite appearing democratic, Hong Kong's Basic Law is communist in application.[425] The Basic Law gives Hong Kong citizens a false sense of protection because it ultimately subjects the admissibility of evidence simply to judicial discretion.[426] The differences between the Basic Law and the Fourth Amendment are present at every phase of the analysis.[427]

First, there are fundamental differences in the origin of the two systems' constitutional provisions which protect against government searches.[428] The Fourth Amendment has existed for more than 200 years and is the product of rebellious change from the tyrannical rule of Britain.[429] The Basic Law has existed for less than ten years.[430]

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417. *See id.*
418. *See id.*
419. *See id.*
420. *See id.*
421. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 422.
422. *See supra* notes 160-250 and accompanying text.
423. *See Chan Kau Tai*, [2006] 1 H.K.L.R.D. at 422.
424. *See id.*
425. *See supra* Parts III.B, IV.
426. *See supra* Part III.B.2.
427. *See supra* Parts II-IV.
428. *See supra* Part II.
429. *See supra* notes 43-110.

Furthermore, the PRC has a great deal of power over amending any provision of the Basic Law; this diminishes the Basic Law's democratic value.[431] Differences in the actual text of the Fourth Amendment and Hong Kong's equivalent have a profound effect on their application from a plain-meaning approach.[432]

Second, there are differences in case law.[433] The United States has a complex Fourth Amendment analysis which has multiple tests with multiple prongs that screen multiple factors.[434] Hong Kong has one test with several sub-parts and ultimately, in application, leaves the decision of admissibility to judicial discretion.[435]

Third, courts in both systems view the law in fundamentally different ways.[436] United States and Hong Kong courts view the reasonable expectation of privacy differently.[437] Furthermore, both systems have significantly different rules regarding the admissibility of evidence after a constitutional breach has occurred.[438] The United States has an exclusionary rule that forbids the admission of evidence obtained in violation of the Fourth Amendment.[439] Hong Kong leaves the judge to exercise discretion after a citizen's constitutional rights have been breached.[440] Additionally, United States courts look to domestic precedent and the text of the Fourth Amendment to analyze evidentiary issues, whereas Hong Kong courts look to foreign jurisdictions, primarily the United Kingdom, for the applicable law.[441] Finally, the United States and Hong Kong accord their respective constitutions different levels of deference.[442] The United States views its Constitution as the supreme law of the land.[443] Hong Kong views the Basic Law as a legal code.[444]

In order for Hong Kong to truly remain autonomous, it must begin to act as a true democracy. This Comment has shown, through a comparative analysis, that a true democracy such as the United States protects its citizens by strictly adhering to the rule of law. Furthermore, if China truly wishes to improve its relationship with other nations and to

430. *See supra* Part II.B.1.
431. *See supra* Part II.B.1.
432. *See supra* notes 90-123 and accompanying text.
433. *See supra* Part III.
434. *See supra* Part III.A.
435. *See supra* Part III.B.
436. *See supra* Part IV.
437. *See supra* Part IV.A.
438. *See supra* Part IV.B.
439. *See supra* note 408 and accompanying text.
440. *See supra* note 365 and accompanying text.
441. *See supra* Part IV.C.
442. *See supra* Part IV.D.
443. *See supra* note 403 and accompanying text.
444. *See supra* note 373 and accompanying text.

be a world leader, then it must adopt more democratic principles. China must look to other democracies for examples of how to protect its citizens. Only by protecting its citizens and thereby increasing the morale of society in general will China maximize the respect it is due on the world stage.